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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO RODRIGUEZ,

Defendant and Appellant.

D075890

(Super. Ct. No. SCN340334)

APPEAL from a judgment of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Affirmed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General for Plaintiff and Respondent.

BACKGROUND

In February 2014, defendant began a sexual relationship with 16-year-old Rebecca. He was 41 years old. When Rebecca's parents learned about the relationship, defendant was prosecuted for committing sexual acts with a minor.¹

At the time of defendant's arraignment, the trial court ordered him not to have any contact with Rebecca or her parents, either personally or through any third party, "with the exception of the attorney of record." The court further ordered defendant not to attempt or actually prevent or dissuade any victim or witness from attending a hearing, testifying, or making a report to a law enforcement agent or other person. The minute order from the arraignment states that defendant was served at the arraignment with a written order memorializing the court's oral ruling. Defendant testified that he did not receive the written order itself until two weeks later.

On multiple occasions in the week following his arraignment, defendant called his brother, Juan Rodriguez (Juan), from jail and asked Juan to convey messages to Rebecca. Defendant asked Juan to tell Rebecca, inter alia, that defendant "need[ed her] help," she

¹ Our recitation of the facts underlying this case is taken directly from the relevant portions of this court's opinion in the related case of *People v. Rodriguez* (2018) 25 Cal.App.5th 1100 (review denied and ordered not be officially published (Nov. 14, 2018) (San Diego County Sup. Ct. Case No. SCN333477)). During the pendency of that case, the trial court issued a protective order. Defendant's current convictions arose from violating the court's protective order.

Defendant has filed an unopposed request that this court take judicial notice of its prior opinion in case No. D071948 and the underlying trial court record. We therefore grant defendant's request.

should recant statements that she had made to the police regarding her relationship with defendant, and she should "plead the 5th." Defendant also convinced Juan to mail a phone to Rebecca, which she received. Several months later, defendant arranged for a second phone to be mailed to Rebecca.

While in jail, defendant called the phones he had sent to Rebecca as frequently as three times per day and more than 400 times in total. In the proceedings below, the prosecution played audio recordings of 32 phone calls between defendant and Rebecca, which were recorded on the jail telephone monitoring system. Rebecca testified that she recognized all 32 of the recordings as calls between herself and defendant. These calls are the basis for counts 6 through 37 of the amended information in this case.

Rebecca testified that over the course of multiple phone and text conversations, defendant asked her to recant her statements to law enforcement regarding her relationship with defendant. Rebecca testified that defendant also e-mailed her and asked her to sign a document that purported to recant such statements. Further, Rebecca testified that defendant asked her to lie throughout this case, including at the preliminary hearing and at trial.

Defendant was charged in count 1 with conspiracy to obstruct justice (Pen. Code,² § 182, subd. (a)(5)) and in count 2 with conspiracy to disobey a court order (§ 182, subd. (a)(1)). Overt acts 1, 2, 3, 4, 5, 6, 7, and 8 were identically charged in counts 1 and 2.

² All further statutory references are to the Penal Code unless noted otherwise.

Overt act 1 alleged defendant and Juan discussed sending a cell phone with phone number ending in 0626 to Rebecca. Overt act 2 alleged Juan sent the phone to Rebecca using Federal Express. Overt act 3 alleged defendant called Juan asking if Rebecca had received the phone. Overt act 4 defendant asked Juan to tell Rebecca to answer the phone when defendant called her from jail. Overt act 5 alleged that Juan told defendant that Rebecca said she would not answer the phone because the calls were recorded.

Overt act 6 alleged: "On July 20, 2014, [defendant] called [the number ending in 0626] and spoke to Rebecca J." Overt act 7 alleged: "Between July 20, 2014 and January 2, 2015 [defendant] called [that same number] from jail at least 100 times to speak with Rebecca J." Overt act 8 alleged: "Between July 20, 2014 and January 2, 2015, defendant called [a different number ending in 2874] from jail at least 20 times to speak with Rebecca J."

Counts 6 through 35 all charged defendant with violating a court order by contacting Rebecca by telephone between July 20, 2014 and January 4, 2015. The only difference among the counts were the dates and times:

Counts 6, 7, 8, and 9 alleged four phone calls on July 20 at 9:19, 9:43, 14:35, and 14:44.

Count 10 alleged a phone call on July 23.

Count 11 alleged a phone call on July 26.

Counts 12 and 13 alleged two phone calls on July 31.

Count 14 alleged a phone call on August 1.

Count 15 alleged a phone call on August 2.

Counts 16 and 17 alleged two phone calls on August 3,

Counts 18 and 19 alleged two phone calls on August 5.

Count 20 alleged a phone call on August 6.

Counts 21 and 22 alleged two phone calls on October 22.

Counts 23 and 24 alleged two phone calls on October 23.

Counts 25, 26, and 27 alleged three phone calls on October 24 at 21:33, 22:05, and 22:37.

Counts 28 and 29 alleged two phone calls on October 25 at 9:14 and 9:38.

Counts 30, 31, 32, and 33 alleged four phone calls on October 26 at 8:22, 8:55, 21:17, and 21:50.

Counts 34 and 35 alleged two phone calls on October 27 at 21:18 and 21:29.

Count 36 simply alleged defendant violated the court order by contacting Rebecca on August 17, 2014, without specifying how she was contacted.

On January 27, 2017, a jury convicted defendant of conspiracy to obstruct justice (count 1; § 182, subd. (a)(5)); conspiracy to disobey a court order (count 2; §§ 166, subd. (a)(4)/185, subd. (a)(1)); making false statements to obtain unemployment benefits (count 3; Unemp. Ins. Code, § 2102, subd. (a)); conspiracy to make false statements to obtain unemployment benefits (count 4; § 182, subd. (a)(1)); aiding and abetting forgery (count 5; § 470, subd. (b)); and 32 misdemeanor counts of disobeying a court order (counts 6

through 37; § 166, subd. (a)(4)). As punishment for defendant's crimes, the trial court imposed an aggregate term of 18 years in prison.

On appeal, this court accepted concessions by the People and held that only one of the conspiracy convictions in counts 1 and 2 could stand because the conspiracies arose from the same agreement; it remanded the matter for the trial court to decide which conspiracy count to dismiss. Additionally, this court ordered the trial court to dismiss count 5, and it vacated the sentences in misdemeanor counts 6 through 37, as the 180 days imposed for each count did not total the 16 years the trial court imposed for those offenses.

At resentencing, the trial court dismissed counts 2 and 5. It imposed the midterm of eight months on counts 1 and 3, and a three-year term on count 4, which it stayed under section 654, for a total term of one year four months, to be served in state prison consecutively to the sentence imposed in case No. SCN333477. The trial court also imposed six-month terms on misdemeanor counts 6 through 37, and stayed imposition of sentence on count 37 under section 654, for a total term of 15 years six months, to be served in local custody and consecutively to the prison term.

Defendant filed a timely notice of appeal.

ANALYSIS

Defendant urges the punishments for counts 6 through 36 must be stayed. The basis for his argument is that under section 654, these counts constitute a single course of conduct and are simply a different way of punishing the conspiracy alleged in count 1. We disagree.³

Section 654, subdivision (a) provides:

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

As the parties note, section 654 has been extended to prohibit multiple punishment for a course of conduct that constitutes an indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) However, the statute's prohibition on multiple punishment does not apply where the defendant has demonstrated multiple and independent objectives, even where there may be an indivisible course of conduct. (*Ibid.*) It also has been held that one who commits separate, factually distinct crimes is more culpable than

³ Defendant argues the issue is preserved despite the fact he did not raise it in his first appeal. The People do not urge otherwise. We therefore reach the merits of the issue.

one who commits only one crime in pursuit of the same intent and objective. (*People v. Correa* (2012) 54 Cal.4th 331, 341.)

The question of whether section 654 is applicable to a given situation or series of events is a decision for the trial court, and the court has broad latitude when it makes such a determination. The trial court's findings in this regard must be upheld if there is substantial evidence to support its determination. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) A reviewing court views the evidence in the light most favorable to the judgment and presumes in support of the sentence every fact the trier of fact can reasonably deduce from the evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312–1313.)

Criminal conspiracy punishes the act of conspiring to commit any crime. (§ 182, subd. (a)(1).) It requires two or more persons agree to commit a crime as well as an overt act by at least one of the parties in the furtherance of the conspiracy. (*People v. Homick* (2012) 55 Cal.4th 816, 870.) Criminal conspiracy is an offense distinct from the commission of the actual underlying offense that is the object of the conspiracy. (*People v. Morante* (1999) 20 Cal. 4th 403, 416.) And where both offenses are charged, the law has considered the conspiracy and the completed substantive offense to be separate crimes. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615; also see *Iannelli v. United States* (1975) 420 U.S. 770, 777–778.)

Count 1 alleged defendant conspired to obstruct justice with his brother Juan by purchasing, shipping, and checking on receipt of two cellular telephones for Rebecca. Overt acts 1-7 dealt with a specific card ending 0626. Overt act 8 dealt with a card ending 2874. With respect to count 1, the conspiracy alleged was obstruction of the court's order the defendant not attempt to contact Rebecca. By involving Juan, the conspiracy went far beyond the specific instances where the defendant contacted and attempted to contact Rebecca. Counts 6 through 36 were also separate in time, nor did any such counts directly involve Juan or his participation when each occurred.

In light of the facts, we conclude the court properly exercised its discretion in imposing, and the evidence supports the trial court's application of, separate consecutive sentences for counts 6 through 37.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.